U.S. Court of Appeals for the Federal Circuit

RUBIES COSTUME COMPANY, Plaintiff-Appellant v. UNITED STATES, Defendant-Appellee

Appeal No. 2018–1305

Appeal from the United States Court of International Trade in No. 1:13-cv-00407-MAB, Judge Mark A. Barnett.

Decided: April 29, 2019

GLENN H. RIPA, New York, NY, argued for plaintiff-appellant. Also represented by JOHN ANTHONY BESSICH, SUZANNE MCCAFFERY, Follick & Bessich, P.C., Huntington Station, NY.

PETER MANCUSO, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, New York, NY, argued for defendant-appellee. Also represented by AMY RUBIN; JEANNE DAVIDSON, JOSEPH H. HUNT, Washington, DC; MICHAEL W. HEYDRICH, Office of the Assistant Chief Counsel, United States Bureau of Customs and Border Protection, United States Department of Homeland Security, New York, NY.

Before PROST, *Chief Judge,* REYNA and HUGHES, *Circuit Judges.*

REYNA, *Circuit Judge.*

Rubies Costume Company appeals the grant of summary judgment by the Court of International Trade in favor of the Government as to the tariff classification of certain imported merchandise. The imported merchandise consists of a nine-piece Santa Claus costume packaged and sold together as a set. The Santa Claus costume is customarily worn in connection with the celebration of the Christmas holiday. The parties argue as to the implications of the "festive" nature of the costume. The merchandise, however, is excluded from classification as "festive articles" by the notes to chapter 95 of the Harmonized Tariff Schedule of the United States. The correct classification of the merchandise is under HTSUS 6110.30.30, 6103.43.15, 6116.93.94, and 4209.92.30. On that basis, we affirm the judgment of the Court of International Trade.

BACKGROUND

I. The Imported Merchandise

The Court of International Trade ("CIT") set forth the following undisputed facts. Rubies Costume Company ("Rubies") imports and sells traditional Christmas Santa Claus costumes, including the "Premier Plush 9 Piece Santa Suit" ("the Santa Suit") at issue in this case.

The Santa Suit consists of a jacket, pants, gloves, a toy sack, a beard, a wig, a hat, a belt, and shoe covers. Rubies pack-ages and sells the nine pieces of the Santa Suit together in a zippered plastic bag as shown below:

J.A. 649.

The jacket and pants are made from 73% acrylic/27% polyester knit pile fabric. The sewn-in care instruction labels in the jacket and pants state that the garments require dry cleaning.

The jacket comes in one standard size and has a double-layer collar with white faux fur fabric and a front snap closure. The jacket features a full-length zipper closure in the front, concealed by an overlapping flap of white faux fur that snaps at top and bottom. The jacket sleeves have turned-edge hemming and white faux fur cuffs. The jacket also includes double-layer belt loops and tightly stitched interior seams. Woven satin fabric lines the entire jacket.

The pants have pockets with turned-edge hemming and tightly stitched seams. An elasticized waist with a 1.75”-wide waist band secures the pants on the wearer. The ankle edge of the pants is sewn with a loose overlock stitch that the wearer tucks into boots during use. Woven satin fabric also lines the pants.

Of the other pieces of the Santa Suit, only the gloves and toy sack are also at issue in this case. The gloves consist of 100% polyester knit fabric and have fourchettes between the fingers. The toy sack

measures thirty-six inches in length and is constructed from 100% polyester knit pile fabric. The toy sack closes with a drawstring cord.

II. The Procedural History

On June 20, 2012, Rubies requested a binding pre-importation ruling from U.S. Customs and Border Protection ("Customs") on the tariff classification of the Santa Suit. Exactly one year later, Customs issued Ruling Letter HQ H237067 in which it classified the Santa Suit under several tariff classifications of the Harmonized Tariff Schedule of the United States ("HTSUS"). *See* Customs Ruling HQ H237067 (June 20, 2013), 2013 WL 3783025, at *1. On October 25, 2013, after Rubies entered the subject merchandise, Customs applied its HQ H237067 ruling and liquidated the entry of the Santa Suit according to the following classifications and duty rates for each piece:

Piece	**HTSUS Class**	**Duty Rate**
Jacket	6105.20.20	32.0% *ad valorem*
Pants	6103.43.15	28.2% *ad valorem*
Gloves[1]	6115.95.60	10.0% *ad valorem*
Toy Sack	4202.92.30	17.6% *ad valorem*
Beard, Wig, Hat, Belt, Shoe Covers	9505.90.60	Free of Duty

J.A. 6–7; J.A. 719–21.

Rubies protested the liquidation of the entry pursuant to 19 U.S.C. § 1514(a). Rubies contended that all nine pieces of the Santa Suit fall under HTSUS chapter 95 as "[f]estive . . . articles," requiring duty-free entry, and re-quested an accelerated disposition of the protest. Customs did not render a decision on the protest within thirty days, so the protest was deemed denied under 19 U.S.C. § 1515(b) on December 14, 2013. On December 27, 2013, Rubies filed suit in the CIT, challenging the denied protest.

After discovery, Rubies and the Government filed cross-motions for summary judgment. The CIT denied Rubies' motion and granted summary judgment in favor of the Government. The CIT found that "the Santa Suit is not a festive article." J.A. 2. The CIT found that the pieces of the Santa Suit fell under the following HTSUS provisions: 6110.30.30 for the jacket; 6103.43.15 for the pants; 6116.93.94 for the gloves; and 4202.92.30 for the toy sack. The parties did not dispute the classification of the beard, wig, hat, belt, and shoe covers.

[1] In Ruling Letter HQ H237067, Customs classified the gloves under 6116.93.94. Otherwise, Customs' liquidation of the entry was consistent with the Ruling Letter.

The CIT's classification of the Santa Suit jacket differed from Customs' classification. The CIT determined that the jacket fell under heading 6110, and not heading 6105. Note 4 of chapter 61 requires that garments under heading 6105 must have more than ten stitches per linear centimeter. J.A. 33. The undisputed facts at summary judgment showed that the jacket did not meet this requirement. The CIT, therefore, found that the proper classification for the jacket was under heading 6110, specifically 6110.30.30, which does not have the same requirement and coincidentally provides the same duty as HTSUS 6105.20.20: 32.0% *ad valorem*.

The CIT also determined that the gloves were classified under heading 6116, rather than heading 6115, as Customs classified them at liquidation. The CIT's classification was consistent with Ruling Letter HQ H237067 and resulted in an increased duty of 18.6% *ad valorem*.

Rubies timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

DISCUSSION

We review the CIT's grant of summary judgment de novo. *Gerson Co. v. United States*, 898 F.3d 1232, 1235 (Fed. Cir. 2018) (citing *Otter Prods., LLC v. United States*, 834 F.3d 1369, 1374–75 (Fed. Cir. 2016)). Despite our de novo review, "we give great weight to the informed opinion of the CIT." *Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1162 (Fed. Cir. 2017).

The classification of goods under the HTSUS requires a two-step process. First, the court "determines the proper meaning of specific terms in the tariff provisions, which is a question of law that we review without deference." *Gerson*, 898 F.3d at 1235. Second, the court determines whether the subject merchandise falls within the description of such terms as properly construed, which is a question of fact that we review for clear error. *La Crosse Tech., Ltd. v. United States,* 723 F.3d 1353, 1358 (Fed. Cir. 2013). If there is "no dispute as to the nature of the merchandise, the two-step classification analysis collapses entirely into a question of law." *Gerson*, 898 F.3d at 1235 (internal quotation marks omitted).

The HTSUS comprises a hierarchical structure that separates goods by headings and subheadings. *Otter Prods.*, 834 F.3d at 1375. The General Rules of Interpretation ("GRIs") of the HTSUS and the Additional United States Rules of Interpretation govern the classification of goods. *Id.* We apply the GRIs in numerical order, starting with GRI 1. *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999).

GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative Section or Chapter notes." "We apply GRI 1 as a substantive rule of interpretation, such that when an imported article is described in whole by a single classification heading or subheading, then that single classification applies, and the succeeding GRIs are inoperative." *La Crosse Tech.,* 723 F.3d at 1358 (quoting *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011)). We interpret HTSUS terms according to their common and commercial meaning unless there is contrary legislative intent and may consult dictionaries, scientific authorities, and other reliable sources to ascertain the common meaning. *Otter Prods.*, 834 F.3d at 1375.

The applicable HTSUS[2] headings in this case are as follows:

> 4202
>
> [T]oiletry bags, knapsacks and backpacks, hand-bags, shopping bags, wallets, purses . . . tobacco pouches, tool bags, sports bags . . . and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper
>
> . . . .
>
> 6110
>
> Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted:
>
> . . . .
>
> 6116
>
> Gloves, mittens and mitts, knitted or crocheted:
>
> . . . .
>
> **9505**
>
> **Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof.**

(emphasis added). Notes 1(d), 1(e), and 1(u) to chapter 95 state the following:

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[2] We cite to the 2013 version of the HTSUS in effect on the date of importation. *See LeMans Corp. v. United States*, 660 F.3d 1311, 1314 n.2 (Fed. Cir. 2011).

> [t]his chapter does not cover
>
> . . . .
>
> (d) Sports bags or other containers of heading 4202, 4303 or 4304;
>
> (e) Sports clothing or **fancy dress, of textiles, of chapter 61 or 62**;
>
> . . . .
>
> (u) Racket strings, tents or other camping goods, or gloves, mittens and mitts (classified according to their constituent material).

(emphasis added).

I. *Rubies I*

This court previously addressed the tariff classification of textile costumes in *Rubie's Costume Co. v. United States*, 337 F.3d 1350, 1352 (Fed. Cir. 2003) ("*Rubies I*[3]"). In *Rubies I*, Rubies, the largest manufacturer of costumes in the United States, filed a Domestic Interested Party Petition, asserting that Customs should classify certain textile Halloween costumes manufactured by others being imported into the United States as articles of apparel under chapter 61 or 62. *Id.* Rubies contended that these costumes were virtually identical to those manufactured by Rubies, and that Customs had erroneously classified them as duty-free "festive articles." *Id.* The CIT agreed with Rubies and granted summary judgment in its favor. *Id.* at 1353.

On appeal, this court in *Rubies I* observed that Note 1(e) excludes from chapter 95 "fancy dress, of textiles of chapter 61 or 62," but does not define "fancy dress." *Id.* at 1356. According to the *Rubies I* court, "that the term 'fancy dress,' . . . includes costumes is plain enough." *Id.* at 1357. The *Rubies I* court further determined that the "fancy dress" exclusion under Note 1(e) to chapter 95 "encompasses textile costumes that are classifiable as 'wearing apparel' under Chapter 61 or 62." *Id.* at 1356–57. The court identified factors as indicators of wearing apparel such as the extent of styling features, including "zippers, inset panels, darts or hoops, and whether the edges of the materials [are] left raw or finished." *Id.* at 1357. The court reversed the CIT's decision and concluded that Customs correctly determined that "textile costumes of a flimsy nature and construction, lacking in

[3] The parties' briefing refers to this 2003 decision as "*Rubies II*" and to the underlying CIT decision in that case as "*Rubies I*." We reference only our prior decision here, so we refer to it as "*Rubies I*."

durability, and generally recognized as not being normal articles of apparel, are classifiable as 'festive articles'" under chapter 95 of the HTSUS.[4] *Id.* at 1360.

Following *Rubies I*, Customs issued an Informed Compliance Publication, identifying factors that distinguish flimsy, nondurable costumes classified in chapter 95 from those that are well-made, comparable to normal wearing apparel classified in chapters 61 and 62. U.S. Customs & Border Prot., Classification of Textile Costumes Under the HTSUS (2008), https://www.cbp.gov/sites/default/files/doc-uments/icp077_3.pdf ("*Textile Costume ICP*"). The Textile Costume ICP establishes four distinguishing factors to consider in determining whether the costume is flimsy or well made: styling, construction, finishing touches, and embellishments. *Id.* at 11. Customs relied on the Textile Costume ICP in classifying the Santa Suit in Ruling Letter HQ H237067. Although not binding on this court, the ICP provides examples for each factor and guidance as to Customs' analysis in this matter.

The examples provided in the ICP align with the factors identified by the court in *Rubies I*, which recited "zippers, inset panels, darts or hoops, and whether the edges of the materials [are] left raw or finished" as indicators of wearing apparel. 337 F.3d at 1357. The ICP provides examples of well-made styling, including merchandise with two layers of fabric and double-layer collars or belts. *Textile Costume ICP* 12. Examples of well-made construction include tight stitching and finished edges. *Id.* at 13. Examples of well-made finishing touches include thick, durable elastics and zipper closures with a fold fabric that covers the zipper. *Id.* at 14. Examples of well-made embellishments include "embroidery, trimmings, and appliqués that have been sewn to the fabric," as well as "decorative overlock stitching visible at the neckline or wrists which provides ornamentation and increased durability at edges which receive significant wear." *Id.* at 15.

II. The Santa Suit

Classification of the Santa Suit requires a two-step process: (1) determining the meaning of terms in the HTSUS, a legal question, *Gerson*, 898 F.3d at 1235; and (2) determining whether the subject merchandise falls within the description of such terms as properly construed, a factual question, *La Crosse Tech.,* 723 F.3d at 1358. The two-step classification inquiry ends at step one and remains solely a

[4] The *Rubies I* court afforded *Skidmore* deference to Customs' interpretation of textile costumes classifiable as "festive articles." *Id.* at 1354 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). In this appeal, neither party challenges the *Rubies I* interpretation.

legal question if the nature of the merchandise is not in dispute. *See Gerson*, 898 F.3d at 1235.

Rubies argues that the CIT erred in granting summary judgment in favor of the Government because a genuine issue of fact exists as to whether the Santa Suit is "either [a] festive article or fancy dress." Appellant Br. 9. Rubies argues that the Santa Suit "does not constitute fancy dress because it does not constitute a usual and normal article of wearing apparel." *Id*. at 7. Rubies further argues that "there is a distinction between well-made wearing apparel and a well-sewn costume that is intended to be worn by a person for the purpose of accurately portraying a festive character during a festive season." *Id*. at 16. Rubies' arguments rely on its belief that because the Santa Suit is plainly a festive costume worn for festive occasions, it cannot be a normal article of wearing apparel.

There is no dispute that the Santa Suit is a costume traditionally worn in conjunction with the celebration of Christmas, a festive occasion, to portray Santa Claus, a fictional jolly character that significantly contributes to the festivity of the occasion. Instead, the dispute centers on the meaning and scope of terms in the HTSUS, not on the nature of the Santa Suit.

Rubies' arguments misapprehend that in *Rubies I*, we recognized that "fancy dress" plainly includes costumes. 337 F.3d at 1356–57 ("[T]he relevant definition of 'fancy dress' is 'a costume (as for a masquerade or party) departing from conventional style and usu[ally] representing a fictional or historical character, an animal, the fancy of the wearer, or a particular occupation.'" (citing *Fancy Dress*, *Webster's Third New International Dictionary* (1986))).

That a person wears the Santa Suit or portions thereof during festive Christmas holiday occasions does not preclude it from classification as "fancy dress" of textile material. Indeed, the "fancy dress, of textiles, of chapter 61 or 62" exclusion under Note 1(e) of chapter 95 presumes that we may otherwise recognize the subject merchandise as a festive article, unless it qualifies as fancy dress, i.e., a costume, of textile material. Thus, an article classified as "fancy dress of textile material" can plainly constitute a costume worn on festive occasions without conflicting with the requirement set forth in *Rubies I* that a "festive article" is "not generally recognized as normal wearing apparel."

In view of the foregoing, we start our analysis by applying GRI 1, which requires us to consult the language in the headings and the chapter notes to determine each article's classification. *Gerson*, 898 F.3d at 1235–36. If the relevant heading terms and chapter notes describe the merchandise such that a single classification subheading

applies to each article, we are not required to consult the subsequent GRIs. The application of GRI 1, however, requires that we determine whether the relevant pieces of the subject Santa Suit fall within the Note 1(e) exclusion pursuant to the factors set forth in *Rubies I*.[5] This process requires us to determine if the undisputed facts establish whether the pieces are of durable and nonflimsy construction and otherwise generally recognized as normal wearing apparel.

The CIT determined that the classification for the Santa Suit jacket is HTSUS 6110.30.30, which covers "[s]weaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted . . . [o]f man-made fibers . . . [o]ther." J.A. 39. Applying the styling, construction, and finishing touch factors noted above, the undisputed facts establish that the Santa Suit jacket has the features of a well-made textile costume, classifiable as wearing apparel under HTSUS chapter 61. The jacket has woven satin fabric lining and is constructed of an acrylic and polyester knit pile fabric. The jacket also has a double-layer collar with white faux fur fabric and a front snap closure, a full-length zipper concealed by white faux fur, finished edges with white faux fur cuffs, double-layer belt-loops, and well-sewn seams. The jacket does not have any embellishments, but that does not change the well-made nature of the jacket based on other factors.

Additionally, the record shows that Rubies manufactures the jacket so that it can be worn and cleaned multiple times throughout the Christmas season, such that the jacket may survive several Christmas seasons. The jacket requires "Dry Clean Only" care. These, along with the factors described above, are all characteristics of normal wearing apparel, and there is no dispute that the jacket is of durable and nonflimsy construction.

Although the precise term for the type of jacket included with the Santa Suit does not appear in the list of items in heading 6110, the jacket shares the characteristics of the named articles in the heading. Like a sweater or sweatshirt, the jacket covers the upper body and provides some warmth to the wearer but does not protect against wind, rain, or extreme cold. The wearer can also wear the jacket over either undergarments or other clothing. Thus, we hold that heading 6110 covers the Santa Suit jacket under the rule of *ejusdem generis* because the jacket shares the essential characteristics of the articles named in the heading. *See Victoria's Secret Direct, LLC v. United States*, 769 F.3d 1102, 1107 (Fed. Cir. 2014). The CIT therefore cor-

[5] "1. This chapter does not cover . . . (e) Sports clothing or fancy dress, of textiles, of chapter 61 or 62." HTSUS Chapter 95, Note 1(e).

rectly found that the proper classification for the jacket is under HTSUS heading 6110, which excludes it from classification as a "festive article."

The CIT classified the Santa Suit pants under HTSUS 6103.43.15, covering "men's or boy's . . . trousers . . . [o]f synthetic fibers . . . [o]ther." J.A. 39. The undisputed facts establish that the pants also have the features of a well-made textile costume, classifiable as wearing apparel under HTSUS chapter 61. Like the jacket, the pants have woven satin fabric lining and are constructed of an acrylic and polyester knit pile fabric. The pants also have finished, turned-edge hemmed pockets and a thick, durable elastic 1.75"-waist band. Although the ankle edges have loose, overlock stitching, the ankle edges are hidden when the pants are tucked into boots. The pants do not have any embellishments, but as with the jacket, that factor does not change the classification of the pants as a well-made textile costume.

Further, Rubies manufactured the pants in such a way to survive multiple wears throughout the Christmas season and subsequent Christmas seasons, and the pants also require dry cleaning. In addition to the factors identified above, these are characteristics of normal wearing apparel, and there is no dispute that the pants are of durable and nonflimsy construction. Thus, the CIT correctly found that the proper classification for the pants is under HTSUS heading 6103, which excludes them from classification as "festive articles."

The CIT also concluded that the Santa Suit gloves are classified under HTSUS 6116.93.94, covering "[g]loves . . . [knitted] . . . [o]f synthetic fibers . . . [o]ther . . . [w]ith fourchettes." J.A. 40. Note 1(u) to chapter 95 excludes "gloves" from classification as "festive articles." The undisputed facts establish that the Santa Suit gloves consist of 100% polyester knit fabric and have fourchettes and are thus plainly described in the HTSUS heading and subheading. Therefore, the CIT correctly found that the proper classification for the gloves is under HTSUS heading 6116, which excludes them from classification as "festive articles."

The CIT found that the Santa Suit toy sack is classified under HTSUS 4202.92.30, covering "[t]ravel, sports and similar bags . . . of textile materials: [o]ther." J.A. 42. Although chapters 61 and 62 do not cover the toy sack, Note 1(d) to chapter 95 also excludes "[s]ports bags or other containers of heading 4202, 4303 or 4304" from classification as "festive articles." HTSUS heading 4202 encompasses a variety of bags, knapsacks, backpacks, and similar bags of textile materials. The undisputed facts establish that the toy sack is made from the same fabric as the jacket and pants, measures thirty-six inches in length, and closes with a drawstring cord. Although "toy sack" does

not specifically appear in the list of items in heading 4202, we have defined the essential characteristics of items under this heading as "organizing, storing, protecting, and carrying various items." *Totes, Inc. v. United States*, 69 F.3d 495, 498 (Fed. Cir. 1995). The toy sack, with its drawstring closure and size, has at least the essential characteristic of carrying various items. Thus, the CIT correctly found the proper classification for the toy sack is under heading 4202, which excludes it from classification as a "festive article."

CONCLUSION

Based on the foregoing, we hold that the items of merchandise in question are articles of normal wearing apparel, and that the tariff classifications for the Santa Suit jacket, pants, and gloves are, respectively, HTSUS 6110.30.30, 6103.43.15, and 6116.93.94. The classification for the toy sack is HTSUS 4209.92.30. On that basis, the judgment of the CIT is affirmed.

AFFIRMED

COSTS

No Costs.

KALLE USA, INC., Plaintiff-Appellant v. UNITED STATES, Defendant-Appellee

Appeal No. 2018–1378

Appeal from the United States Court of International Trade in No. 1:13-cv-00003-GSK, Judge Gary S. Katzmann.

Decided: May 2, 2019

FREDERIC VAN ARNAM, JR., Barnes, Richardson & Colburn, LLP, New York, NY, argued for plaintiff-appellant.

HARDEEP KAUR JOSAN, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, New York, NY, argued for defendant-appellee. Also represented by AMY RUBIN; JEANNE DAVIDSON, JOSEPH H. HUNT, Washington, DC; PAULA S. SMITH, Office of the Assistant Chief Counsel, United States Bureau of Customs and Border Protection, United States Department of Homeland Security, New York, NY.

Before DYK, CHEN, and HUGHES, Circuit Judges.

Opinion for the court filed PER CURIAM.
Concurring opinion filed by *Circuit Judge* HUGHES.

PER CURIAM.

This is a tariff classification case involving imported sausage casings. Kalle USA, Inc. appeals the Court of International Trade's summary judgment decision classifying the casings as made-up textiles under subheading 6307.90.98 of the Harmonized Tariff Schedule of the United States. *Kalle USA, Inc. v. United States*, 273 F. Supp. 3d 1319, 1333 (Ct. Int'l Trade Nov. 2, 2017). Kalle argues that the Trade Court erroneously interpreted the phrase "completely embedded in plastics" as it is used in HTSUS Chapter 59 Note 2(a)(3), and that the casings should be classified as plastics under HTSUS Chapter 39. Because we agree with the result reached by the Trade Court, we affirm.

I

A.

Kalle imports its NaloProtex G1 and NaloProtex G2 casings[1] into the United States from Germany. The casings, which are used to encase processed food products, such as sausage, ham, or cheese, are comprised of a woven textile sheet that is coated with a layer of plastic on one side. "The plastic coating is chosen to be appropriately thin" and "only fills the interstitial spaces between the textile fibers"

[1] The differences between the two types of casings are immaterial for purposes of this appeal.

to ensure that the casing's "textile character remains recognizable even after a coating." J.A. 81. The textile material gives the casing its strength and shape and allows the casing to "absorb dyes and aroma substances and transfer these substances into the encased product." *Id.* The plastic coating helps "prevent moisture transmission into or out of the casings." *Id.* After the textile sheet is coated in plastic, the sheet is trimmed, folded to form a tube, and "fixed with a seam by gluing." *Id.* The casings are imported as flattened tubes wound around a cardboard core.

B.

Kalle imported nine entries of the NaloProtex casings between July and August of 2010. The casings were liquidated by United States Customs and Border Protection in June 2011 under HTSUS subheading 6307.90.98 (2010),[2] which covers "[o]ther made up articles, including dress patterns: . . . [o]ther . . . [o]ther" and is subject to a duty of 7%. Kalle filed a protest to Customs' determination in September 2011, arguing that the casings should be classified under HTSUS subheading 3917.39.0050, which covers "[t]ubes, pipes and hoses and fittings therefor (for example, joints, elbows, flanges), of plastics: . . . [o]ther . . . [o]ther" and is subject to a duty of 3.1%. Kalle emphasized that the "tubes, pipes, and hoses" of heading 3917 "include[] sausage casings and other lay-flat tubing." *See* HTSUS Chapter 39 Note 8. Customs denied Kalle's protest.

Kalle then filed a complaint with the Trade Court in January 2013. The Trade Court granted summary judgment in favor of the government after determining that "the casings are made up articles of textile fabric, [so] they are properly classified under heading 6307." *Kalle*, 273 F. Supp. 3d at 1336. The court noted that heading 6307 is within HTSUS Section XI and that Chapter 39 expressly excludes goods of Section XI from its scope. *See* HTSUS Chapter 39 Note 2(p) (noting that "[t]his chapter does not cover . . . [g]oods of section XI (textiles and textile articles)"). Therefore, the court concluded that the casings "cannot be classified under heading 3917" as Kalle argued. *Kalle*, 273 F. Supp. 3d at 1336.

The Trade Court rejected Kalle's argument that the casings are "completely embedded in plastics" and are thus excluded from Section XI pursuant to HTSUS Chapter 59 Note 2(a)(3). Citing dictionary definitions of the words "completely" and "embedded," the court determined that "for a textile to be completely embedded in plastic, it

[2] All references to section notes, chapter notes, headings, or subheadings contained herein are to 2010 HTSUS.

must be entirely firmly fixed in the plastic." *Id.* at 1333. Because the "casings are only coated on one side and . . . the coating material only fills the interstitial spaces between the textile fibers," the Trade Court found that the casing's "textile is not embedded in the plastic for purposes of [Chapter 59 Note] 2(a)(3)." *Id.*

Kalle now appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

II

A.

The parties agree that this case turns on the interpretation of the phrase "completely embedded in plastics" as it is used in HTSUS Chapter 59 Note 2(a)(3). An overview of the relevant tariff provisions illustrates why that issue is determinative.

The HTSUS is organized by headings, which cover "general categories of merchandise," and each heading contains one or more subheadings, which "provide a more particularized segregation of the goods within each category." *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). "[T]ariff classification of merchandise under the HTSUS is governed by the principles set forth in the General Rules of Interpretation ('GRIs')." *Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1366 (Fed. Cir. 2013). The GRIs are applied in numerical order. *Id.* Under GRI 1, "the HTSUS headings, as well as relative section or chapter notes, govern the classification of a product." *Orlando Food Corp.*, 140 F.3d at 1440. Section and chapter notes "are not optional interpretive rules, but are statutory law, codified at 19 U.S.C. § 1202." *Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 926 (Fed. Cir. 2003).

The government argues that under GRI 1, the casings are classifiable as made-up textiles under Chapter 63 of the HTSUS, subheading 6307.90.98. For an article to fall under Chapter 63, it must be an article "of any textile fabric." HTSUS Chapter 63 Note 1. Kalle argues that the casings are not articles "of any textile fabric" and are instead plastic articles classifiable under Chapter 39, subheading 3917.39.0050.

Because of two mutually exclusive exclusionary notes, an article cannot be classifiable under both Chapter 63 and Chapter 39. First, Note 1(h) of Section XI states that Section XI, which includes Chapter 63, "does not cover: . . . [w]oven, knitted, or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics, or articles thereof, of chapter 39." Second, Note 2(p) of Chapter 39 excludes "[g]oods of section XI (textiles and textile articles)" from the scope of Chapter 39. Thus, if the casings are textile articles of Section

XI, then they are not classifiable under Chapter 39; and if the casings are plastic articles of Chapter 39, then they are not classifiable under Section XI.

Here, the casings are comprised of both textile and plastic materials. Where an article is comprised of both textile and plastic, we must look to Chapter 59 to determine whether the article should be classified as a textile under Section XI or a plastic under Chapter 39. Chapter 59 falls within Section XI, and it covers "impregnated, coated, covered or laminated textile fabrics." Heading 5903 of Chapter 59 specifically applies to "[t]extile fabrics, impregnated, coated, covered or laminated *with plastics*." (emphasis added). But, heading 5903 does not cover "[p]roducts in which the textile fabric is either *completely embedded in plastics* or entirely coated or covered on both sides with such material." HTSUS Chapter 59 Note 2(a)(3) (emphasis added). Instead, those products fall under Chapter 39. *Id.*

Therefore, the controlling question here is whether the casings' textile fabric is "completely embedded in plastics." *Id.* If the casings are "completely embedded," the government agrees that they should be classified under Kalle's proposed subheading, 3917.39.0050. If the casings are not "completely embedded," Kalle does not dispute that they should be classified under subheading 6307.90.98.

B.

Classification of goods under the HTSUS is a two-step process that involves: (1) determining the proper meaning of terms in the tariff provisions; and (2) determining whether the goods fall within those terms. *Sigma-Tau HealthScience, Inc. v. United States*, 838 F.3d 1272, 1276 (Fed. Cir. 2016). We review interpretation of terms in the HTSUS de novo, and we review the factual findings of the Trade Court for clear error. *Id.* Typically, "whether the goods come within the description of [the] terms" in the HTSUS is a factual question. *Kahrs Int'l, Inc. v. United States*, 713 F.3d 640, 644 (Fed. Cir. 2013). However, "when the nature of the merchandise is undisputed, . . . the classification issue collapses entirely into a question of law." *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006).

Although decisions by Customs interpreting provisions of the HTSUS may receive some deference under the principles of *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), Customs' decisions are not controlling upon this court, and "this court has an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms." *MetChem, Inc. v. United States*, 513 F.3d 1342, 1345 (Fed. Cir. 2008) (quoting *Warner-Lambert Co. v. United States*,

407 F.3d 1207, 1209 (Fed. Cir. 2005)); *see also Rubie's Costume Co. v. United States*, 337 F.3d 1350, 1355–56 (Fed. Cir. 2003).

"Absent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings." *La Crosse Tech., Ltd. v. United States*, 723 F.3d 1353, 1358 (Fed. Cir. 2013) (quoting *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999)). When determining common and commercial meaning, "the court may rely upon its own understanding of the terms used [or] consult lexicographic and scientific authorities, dictionaries, and other reliable information." *Baxter Healthcare Corp. v. United States*, 182 F.3d 1333, 1337–38 (Fed. Cir. 1999).

C.

It is undisputed that "completely embedded" is not defined by statute or legislative history, so its common and commercial meaning should be applied. The parties generally agree on the common definitions of the words "completely" and "embedded." The common definition of "embedded" is "set or fix[ed] firmly in a surrounding mass." *See Embedded*, Webster's New World Dictionary, 442–43 (3d coll. ed. 1988); *see also Embedded*, New Oxford American Dictionary, 565 (3d ed. 2010) (defining "embedded" as "to fix (an object) firmly and deeply in a surrounding mass"). The common definition of "completely" is "full[y], whole[ly], entire[ly]." *See Completely*, Webster's New World Dictionary, 285 (3d coll. ed. 1988).

Given these definitions, we agree with the Trade Court that "for a textile to be completely embedded in plastic, it must be entirely firmly fixed in the plastic." *Kalle*, 273 F. Supp. 3d at 1333. The primary dispute between the parties is whether "completely embedded" requires the textile to be surrounded by plastic on all sides. Kalle argues that it does not. According to Kalle, its casings are "completely embedded" because the fabric is fixed to the plastic coating on three sides and does not delaminate from it. We agree with Kalle that "completely embedded" does not require all sides of the fabric to be covered with plastic. But the fact that the fabric is securely attached to the plastic does not mean that it satisfies the requirement that it is "firmly fixed" or "embedded." As the dictionary definitions above make clear, for a textile to be "embedded," it must be "fix[ed] firmly *in a surrounding mass*" of plastic. Webster's, *supra*, at 442–43; *see also* New Oxford, *supra*, at 565. Kalle's casings do not fix the fabric in a surrounding mass of plastic. Rather, the casings have a plastic coating on one side.

Accordingly, we hold that to be "completely embedded," the fabric must be "completely" or entirely fixed in a surrounding mass of

plastic. We disagree with the government that this requires every surface of the fiber to be fixed and surrounded by a mass of plastic. However, because Kalle's casings are not fixed in a surrounding mass of plastic, they are not "completely embedded in plastics."

Our interpretation of "completely embedded" is consistent with the context in which it is used. *See Rubie's Costume Co.*, 337 F.3d at 1357 (declining to interpret terms in an HTSUS exclusionary note "in disregard of the context of the exclusion as a whole"). The purpose of Note 2(a)(3) is to exclude certain articles from the scope of heading 5903, including articles where the fabric is "completely embedded in plastics." Heading 5903 of the HTSUS *prima facie* covers "[t]extile fabrics, impregnated, coated, covered or laminated with plastics." An "impregnated" fabric is one in which "the [plastic] applied penetrates into the fabric and even into the yarn and fibres of which it is composed." *See, Technical Report of the Chemists' Committee to the Customs Cooperation Council*, 11th Session (Nov. 1964), *quoted* in *"Possible Amendment of Note 2(a) to Chapter 59 and the Explanatory Notes to Heading 59.03 (Requested by the EU)*," Harmonized System Review Sub-Committee, World Customs Organization, Doc. No. NR1019Ela (Oct. 20, 2014) at p. 4, Annex II 2 [hereinafter *Technical Report*]. Because "impregnated" fabrics plainly fall within the scope of heading 5903, but "completely embedded" fabrics are excluded, there must be a distinction between a fabric that is "impregnated" with plastic and a fabric that is "completely embedded in plastics."

Our interpretation provides such a distinction because we find that "completely embedded" requires the fabric to be fixed in a surrounding mass of plastic, while "impregnated" does not. Kalle's position, however, lacks this distinction and would read many "impregnated" fabrics to be "completely embedded in plastics" and excluded from heading 5903.

Our interpretation also does not render any of the language of Note 2(a)(3) superfluous. Note 2(a)(3) excludes products with textile fabric that is "*either* completely embedded in plastics *or* entirely coated or covered on both sides with such material." (emphasis added). Our interpretation distinguishes between "completely embedded" and "entirely coated or covered on both sides."

Heading 5903 covers fabrics that are treated with plastic through a variety of processes. *See* HTSUS Heading 5903 (applying to textile fabrics that have been "impregnated, coated, covered or laminated" with plastic). Given this context, we read Note 2(a)(3) to exclude products that are treated with plastic via different processes—"embedd[ing]," "coat[ing]," or "cover[ing]." For example, a fabric may be "completely embedded" in plastic by applying plastic to one side of the

fabric such that plastic fixes the fabric in a surrounding mass, even if not on all sides. In contrast, a fabric may be "covered on both sides" with plastic by applying a sheet of plastic to each side of the fabric, even though the fabric is not fixed in a surrounding mass of plastic. *See Technical Report* at 4 ("A covered fabric consists of a fabric to which a sheet of another material has been fixed."). Although both fabrics have plastic fixed to their outer surfaces, they achieve this result through different processes. We read Note 2(a)(3) to exclude both final products, no matter the process used to create them.

Because Kalle's proposed interpretation fails to give meaningful effect to the inclusion of "completely embedded" and fails to distinguish between an "impregnated" fabric and a "completely embedded" fabric, we decline to adopt it. Instead, we find that our reading of "completely embedded in plastics" is necessary to give effect to all of the language of both heading 5903 and Note 2(a)(3). *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute [courts] are obliged to give effect, if possible, to every word Congress used.").

III

We have considered Kalle's remaining arguments and find them unpersuasive. We conclude that Kalle's NaloProtex G1 and G2 casings are not "completely embedded in plastics" as that phrase is used in HTSUS Chapter 59 Note 2(a)(3). Accordingly, we affirm the Trade Court's decision to classify the casings under HTSUS subheading 6307.90.98.

AFFIRMED

Costs

No costs.

KALLE USA, INC., Plaintiff-Appellant v. UNITED STATES, Defendant-Appellee

Appeal No. 2018–1378

Appeal from the United States Court of International Trade in No. 1:13-cv-00003-GSK, Judge Gary S. Katzmann.

HUGHES, *Circuit Judge, concurring.*

I agree with the panel opinion's conclusion that Kalle's casings are not "completely embedded in plastics" under HTSUS Chapter 59 Note 2(a)(3) but write separately because I reach that conclusion through different reasoning. I would find that the phrase "completely embedded in plastics" requires every surface of a fabric's fibers to be surrounded by plastic. Thus, because the inner surface of Kalle's casings is free of plastic, I agree with the panel opinion that they are not "completely embedded in plastics."

I agree that the common definition of "embedded" is "set or fix[ed] firmly in a surrounding mass," Maj. Op. at 7, and the common definition of "completely" is "full[y], whole[y], entire[ly]," *id.* at 7–8. And by including the adverb "completely" in Note 2(a)(3), I presume that Congress intended to distinguish between fabrics that are "embedded" in plastics and those that are "completely embedded." *See Reiter*, 442 U.S. at 339 ("In construing a statute [courts] are obliged to give effect, if possible, to every word Congress used."). Accordingly, to give full effect to the inclusion of "completely," I would find that "completely embedded" requires that every fiber of the fabric is *entirely* fixed in a surrounding mass of plastic, meaning that every surface of the fiber must be surrounded by plastic.

Here, although Kalle's casings may be "embedded" in plastic because the plastic coating is fixed to the fabric and fills the fabric's interstices, the casings are not "completely embedded" because their inner surfaces are free of plastic. Therefore, I agree with the panel opinion's affirmance of the Trade Court's decision to classify the casings under HTSUS subheading 6307.90.98.